

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Application by Verizon New Jersey)	
Inc., Bell Atlantic Communications,)	
Inc. (d/b/a Verizon Long Distance),)	
NYNEX Long Distance Company)	CC Docket No. 01-347
(d/b/a Verizon Enterprise Solutions),)	
Verizon Global Networks Inc., and)	
Verizon Select Services, Inc., and)	
AuthorizaTion to Provide In-Region,)	
InterLATA Services in New Jersey.)	

COMMENTS OF THE NEW JERSEY CABLE
TELECOMMUNICATIONS ASSOCIATION TO THE
APPLICATION OF VERIZON NEW JERSEY, INC. (VERIZON NJ)
FOR APPROVAL TO PROVIDE IN-REGION LONG DISTANCE SERVICES.

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The within constitute the initial comments of the New Jersey Cable Telecommunications Association ("NJCTA") in this matter. NJCTA is a trade association comprised of cable television companies providing cable television service to the vast majority of the more than 2.4 million cable television customers in New Jersey. NJCTA members are interested in the outcome of this, and other related state proceedings, because they offer the potential to provide facilities-based local telecommunications service -- especially local service to residential users -- by virtue of their deployment of cable television plant throughout the state. Such service would be provided in competition with the well-established local residential and business services provided by Verizon NJ. Thus, NJCTA has a vital interest in seeing that the classifications and PAR provisions adopted herein do not enable Verizon to compete unfairly.

It is facilities-based competitive carriers, including cable companies, who will bring to New Jersey the benefits of local service competition that Congress envisioned when it required removal of the historic barriers to competition in passing the Telecommunications Act of 1996. Facilities-based carriers can introduce competitive state-of-the-art facilities that bring new capabilities to customers and thus spur the incumbent carriers to deploy advanced services. Facilities-based carriers, because of their investment in plant to provide local service, are more likely to stay in the market under temporarily adverse conditions. In a recent speech, the Chairman of the Federal Communications Commission ("FCC") noted the importance of facilities-based local competition as a "principal objective" of national competition policy:

I believe that other methods of entry are useful interim steps to competing for local service, but Commission policy should provide incentives for competitors to ultimately offer more of their own facilities. This would decrease reliance on incumbent networks,

provide the means for truly differentiated choice for consumers, and provide the nation with redundant communications infrastructure.¹

Potential facilities-based carriers, however, will not incur investments in areas where regulatory policies are not in line with the realities of the local service marketplace and where those policies allow the incumbent carriers to maintain barriers to entry that deter the provision of local service by new entrants. These are the barriers that Congress tried to eradicate by passing the Telecommunications Act of 1996. Approval of Verizon NJ's application here at this time would maintain barriers to entry, and would create a new barrier by virtue of Verizon NJ's ability to offer a packaged service of local and long distance services in a marketplace where competition of any significance does not yet exist.

Accordingly, the NJCTA has participated in a number of proceedings before the New Jersey Board of Public Utilities ("NJBPU") related to the provision of services by Verizon NJ, including the proceeding regarding the provision of a consultative report by the NJBPU to the FCC² in this matter. Additionally, NJCTA monitored (though did not participate actively therein) several other related proceedings, including the NJBPU review of Verizon NJ's unbundled network elements rates.³

Rather plainly, NJCTA's chief concern here, and in all of the related proceedings before the NJBPU, is to seek to ensure that its members have a fair opportunity to compete with the incumbent Bell Operating Company, Verizon NJ, for the provision of services in the local services market, and that the benefits of true competition accrue to New Jersey residents.

¹ Opening Remarks, October 23, 2001 Press Conference, "Digital Broadband Migration" Part II. Text available at www.fcc.gov (visited October 24, 2001).

² *I/M/O the Consultative Report of the Application of Verizon-New Jersey, Inc., for FCC Authorization to Provide In-Region, Inter-LATA Services in New Jersey*, NJBPU Docket No. TO01090541, (Final Order pending) "NJBPU 271 Proceeding."

Authorization now by the FCC to allow Verizon NJ to provide in-region long distance services, before there is any real competition for the provision of local services, especially residential services, will preclude the development of such competition; will only strengthen the monopoly hold of Verizon NJ in those markets; and, will not be in the public interest.

Additionally, the Verizon NJ Application is fatally flawed on arrival. Among other things, for reasons that are appropriately laid at the doorstep of Verizon NJ, it did not demonstrate compliance with each and every one of the applicable provisions of Section 271,⁴ and effectively precluded the development of a detailed and extensive record by the NJBPU upon which the FCC may rely in formulating its own resolution of the application.⁵ Specifically, a related matter upon which the NJBPU must necessarily rely in the formulation of a positive consultative report remain without a final order having been issued, and, for reasons discussed below, is legally ineffective.

The NJBPU adopted its staff's recommendations⁶ at its November 20 agenda meeting for the approval of the UNE Summary Order, which it released on December 17, 2001.⁷ The UNE Summary Order recites that it "memorializes" the decision of the NJBPU at its agenda meeting

³ *I/M/O the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc.* Docket No. TO00060356 (Summary Order released December 17, 2001 – "UNE Summary Order," Final Order pending) "NJBPU UNE Rate Proceeding."

⁴ I/M/O Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania: Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269 (rel. Sep. 19, 2001), App. C, Statutory Requirements, para. 5 [the burden of proving compliance with each and every one of the checklist items rests with Verizon NJ even if no other party challenges].

⁵ Indeed, the FCC has held that while it will consider carefully state determinations of fact that are supported by a *detailed and extensive* record, it is its own role to determine whether the factual record supports the conclusion that particular requirements of Section 271 have been met. *Id.* para. 2 The inescapable implication, of course, is that any factual determinations made by a state agency in the development of its consultative report in the absence of a detailed and extensive record will not be accorded significant weight.

⁶ As a matter of practice, NJBPU "staff recommendations" are not released to the public for review and analysis at any time. They are typically presented orally in summary fashion immediately prior to NJBPU consideration of a

of November 20, 2001. It continues that it establishes certain rates, for unbundled network elements, adopts modified inputs and assumptions used in certain cost models used to calculate recurring and non-recurring UNE rates. The UNE Summary Order also recites that the NJBPU, at its November 20th meeting, authorized its Secretary to direct Verizon NJ to “re-run its recurring, non-recurring and switching models consistent with the Board’s findings,” and file the results with the Board and the parties by December 3, 2001. The UNE Summary Order includes a summary of the results obtained thereby, and the determinations with regard to the terms and conditions under which new UNEs should be made available.⁸ The NJBPU then adopted such rates and terms and conditions “effective as of the date of this [UNE Summary Order].”

The UNE Summary Order goes on to recite: “the decisions contained herein are based upon a complex and voluminous record developed during evidentiary proceedings that included 17 days of hearings over fifteen weeks, 26 expert witnesses, over 265 exhibits and over 3,900 pages of transcripts.”⁹ Significantly, and most importantly, the UNE Summary Order is entirely devoid any analysis, or even a recitation of the evidence in the record, concerning the issues of whether the rates selected are cost based or TELRIC compliant. Indeed, in recognition of the fact that more is required, the UNE Rate Summary Order notes: “a final order will be issued in this matter fully setting forth the Board’s analysis of the issues, the positions of the parties, and the reasoning underlying the Board’s determinations.”¹⁰ In the “Background” section, the NJBPU set out the most recent and applicable reason for its concern about the need for an

matter. The NJBPU commissioners, however, most often rely on a written, and presumably more detailed, report by applicable staff as a basis for their vote on a particular matter.

⁷ An unsigned version of the UNE Summary Order is attached hereto as “Exhibit A.”

⁸ Most significantly, none of the parties to the NJBPU rate Proceeding have had the opportunity to test, on the record, those submissions, or the NJBPU staff application of the same.

⁹ UNE Summary Order p. 1.

¹⁰ *Id.* p. 2. To date, no “final” order has been issued. The UNE Rate Summary Order does not set out an anticipated date on which such order is expected.

appropriate “final order.” It noted that the United States District Court for the District of New Jersey had issued a decision that remanded in part an earlier order establishing UNE rates.¹¹ It said

“the District Court Opinion remanded to the Board for further review the issue of recurring and non-recurring UNE rates, access to dark fiber, subloop unbundling and customer specific pricing arrangements. With regard to UNE rates, the Court found that the Board failed to articulate reasonably the basis for its rate determinations. . .”

Of course, the UNE Summary Rate Order suffers from the same defect, as the NJBPU, itself, recognizes.

Because it is not a “final order,” the UNE Rate Summary Order is not legally effective in setting UNE rates. The New Jersey Administrative Procedure Act provides that an administrative agency adjudication in contested cases¹² shall be effective “on the date of delivery or on the date of mailing, of the final decision to the parties of record, whichever shall occur first.”¹³ There is no provision in the New Jersey Administrative Procedure Act, of which NJCTA is aware, that provides for the issuance of a legally effective “summary order” which effectively establishes a final determination of an issue. Indeed, only a “final order” may be appealed, and then the appealing parties have 45 days from receipt of the order within which to file appeals.¹⁴ The UNE rates set out in the UNE Rate Summary Order are not now effective as a matter of law.

Notwithstanding that an appeal may be taken only from “final orders” of administrative agencies, except in unusual circumstances not applicable here, Verizon NJ was quick to signal its

¹¹ *Id.*,

¹² Some may argue that the UNE Rate Proceeding is not a “contested case” and, thus, not subject to the provisions of the New Jersey Administrative Procedure Act. Suffice it to say at this point, that the United States District Court remand cited in the UNE Summary Order had no difficulty in applying “contested case” requirements for a full articulation of the underlying rationale for the establishment of UNE rates.

¹³ N.J.S.A. 52:14B-10(e)

¹⁴ Rules Governing the Courts of the State of New Jersey, R. 2:4-1(b). The timing is such that an appeal could likely be timely taken after the deadline for FCC action here.

concern about the adequacy of the rates set out in the UNE Rate Summary Order. On the very day the NJBPU determined to set the rates, and almost a month before the release of the UNE Rate Summary Order, Verizon NJ issued a press release,¹⁵ in which, among other things, it said: “[Verizon NJ is] concerned that the unbundled network element (UNE) rates ordered today were set at a level designed to artificially stimulate competition, instead of basing them on the established federal pricing formula.”

Clearly the NJBPU recognizes the dilemma caused by Verizon NJ’s filing of its 271 application with the FCC in advance of its issuance of a final consultative report. The matter of the consultative report was considered by the NJBPU at its agenda meeting of January 9, 2002. Commissioner Butler,¹⁶ particularly, expressed his strong displeasure over the NJBPU being put in a position of either having to issue a consultative report sooner than is reasonably appropriate under the circumstances, or not having its voice considered by the FCC in its consideration of Verizon NJ’s 271 application. While ultimately agreeing with the one other commissioner voting¹⁷ to approve the staff recommendation¹⁸ to issue a favorable consultative report to the FCC. The vote was not without significant reservation, however, particularly with regard to the establishment of UNE rates. The expressed intention of the NJBPU is to condition the issuance of a favorable consultative report on Verizon NJ not challenging the rates set out in the UNE Rate Summary Order.¹⁹ As NJBPU President Connie O. Hughes expressly noted: “I think it is

¹⁵ The full text of the press release is set out at Exhibit B, attached hereto.

¹⁶ Honorable Frederick F. Butler, Commissioner. See Transcript, January 9, 2002 NJBPU agenda meeting, pp. 61-63.

¹⁷ The third commissioner recused herself from voting because of a perceived conflict.

¹⁸ As noted with respect to the UNE Rate matter, the “staff recommendation” was presented in summary fashion orally. The details of the recommendation are not public.

¹⁹ The issuance of a favorable consultative report by a state regulatory agency on a conditional basis appears to be unprecedented.

important to emphasize that the Board's past actions that included the establishment of *very low UNE rates* . . . removed barriers to CLECs entering the market in New Jersey.”²⁰

Pursuant to the direction of the NJBPU, its Acting Secretary, on the same day issued a letter²¹ to Verizon NJ's counsel in which he advised:

“By this letter, I wish to formally advise you of certain actions taken by the Board at its January 9, 2002 Agenda Meeting. As part of its review of Verizon New Jersey's compliance with Section 271 of the Telecommunications Act of 1996, the Board determined that a finding of compliance with Checklist Item 2, is conditioned on Verizon charging no more than the new UNE rates to all CLECs in New Jersey effective December 17, 2001. The Board noted that a Verizon challenge of the validity or effective date of the rates or any attempt to increase or otherwise change these rates, will call into question whether modified rates would be TELRIC compliant, and, therefore, also call into question the Board's finding of compliance with Checklist Item 2. Verizon was further required to provide the Board by the end of business on January 10, 2002, an officer's certification that these rates are being charged effective December 17, 2001.”

On the next day, January 10, 2002, Verizon NJ's attorney responded²² to the specific directive of the Acting Secretary's letter with respect to the representation that rates are being charged effective December 17, 2002, the date of release of the UNE Rate Summary Order.

While the letter discussed the implementation of the UNE rates, it conspicuously did not commit to not challenging the rates. Even if Verizon NJ were to agree not to challenge the provisions of whatever final order results from the NJBPU UNE Rate Proceeding, such an agreement would likely be unenforceable²³, and certainly would not preclude a challenge to the validity of such an order by any other party to the proceeding.

²⁰ Transcript, January 9, 2002 NJBPU agenda meeting, p. 56.

²¹ Attached hereto as Exhibit C.

²² Letter to NJBPU Acting Secretary Henry Ogden, Esq. from Bruce D. Cohen, Counsel for Verizon NJ, dated January 10, 2002, attached hereto as Exhibit D.

²³ Assuming that Verizon NJ's concerns that the level of the UNE rates established by the NJBPU are not cost based and are unreasonably low are not frivolous, it has a right to challenge those rates as being “confiscatory” and running afoul of the Fifth Amendment of the United States Constitution. The “Doctrine of Unconstitutional Conditions” holds that government may not grant a benefit (here a favorable consultative report) conditioned on the

The same conundrum faces the FCC in considering the Verizon NJ application now before it. There are not UNE rates that are legally in place, that are demonstrably cost based and TELRIC compliant. As the NJBPU cannot condition a favorable consultative report on the surrender of a constitutional right by Verizon NJ, it seems that the FCC cannot, either. Since a final UNE order has not been issued, Verizon NJ is not even in a position to make an informed judgement about agreeing to surrender that right to which it could be bound. Under the circumstance, the FCC cannot find compliance with Checklist Item 2.

CONCLUSION

The FCC should deny the application of Verizon NJ to provide in-region long distance service, if for no other reason, proof of compliance with Checklist Item 2 cannot be made.

Respectfully submitted,

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beneficiary's surrender of a constitutional right, even though government may withhold the benefit completely. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L.Rev. 1413, 1415 (1989).